86-1230

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY T. HODGES AND LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

EVISEA MARITIME CO., S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether if a longshoreman is injured in an area and/or by equipment under a shipowner's active control during stevedoring operations, the jury must be instructed that the shipowner has only a limited duty to "intervene" if it has actual knowledge of the dangerous condition and actual knowledge that the stevedore is not acting to protect the longshoreman from the danger.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, No. 85-1107, 801 F.2d 678 (4th Cir. 1986), were Gary T. Hodges, Liberty Mutual Insurance Company and Evisea Maritime Co., S.A.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

GARY T. HODGES AND
LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners

v.

EVISEA MARITIME CO., S.A.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Gary T. Hodges and Liberty Mutual Insurance Company respectfully Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 801 F.2d 678, and appears as Appendix A to this Petition.

The District Court denied Respondent's Motion for Judgment N.O.V. or for a New Trial on December 13, 1984. The District Court's rulings on instructions were neither in writing nor recorded but the instructions given to the jury orally have been transcribed and appear as Appendix C. The District Court's oral opinion denying Respondent's Motion for Directed Verdict at the close of the evidence is also transcribed and appears as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1986. Petitioners' Motion for Rehearing and Suggestion for Rehearing En Banc was denied on October 29, 1986. See Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves liability under § 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), which at the time of Petitioner Hodges' injuries stated in relevant part as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the

> employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On July 26, 1977, Petitioner Gary T. Hodges, a Baltimore longshoreman, was found semi-conscious in the No. 3 lower tween deck of the vessel M/V Concordia Sky, which was discharging at Newport News, Virginia. Respondent, Evisea Maritime Co., S.A. (Evisea), was the owner of the Concordia Sky.

Investigation by Petitioner Liberty Mutual Insurance Company (Liberty Mutual), the compensation carrier for the stevedore employing Hodges, revealed that Hodges had last been seen

prior to his injury working on the Concordia Sky as she was loading in Baltimore on July 25, 1977. There were no eyewitnesses to the injury and Hodges was found to have suffered serious head injuries and retrograde amnesia. Liberty Mutual paid Hodges benefits and medical expenses under the LHWCA.

On July 3, 1979, Hodges sued Evisea and the charterer of the Concordia Sky, Concordia Line, alleging that the ship's negligence caused his injuries. Liberty Mutual intervened as plaintiff to recover its interest pursuant to 33 U.S.C. § 933 (1982). Petitioners claimed jurisdiction of the United States District Court under 28 U.S.C. § 1332 and demanded a jury trial.

Hodges' claim of negligence was based upon the theory that the shipowner had actively created a dangerous condition in the No. 3 hold (the hold adjacent to the area in which Hodges

had been working when last seen) by turning out the lights and leaving the hatch and manhole at the upper tween deck level open and unprotected.

On May 7, 1981, the District Court judge granted Respondent's Motion for Summary Judgment against the Petitioners on all counts. Upon the Petitioners' appeal, the Fourth Circuit, on March 10, 1982, in an unpublished opinion, reversed the grant of summary judgment on the basis of the Supreme Court ruling in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981).

During the trial upon remand, Petitioners presented evidence from which the jury could conclude that Hodges was injured by a dangerous condition created by the shipowner in an area of the vessel under the shipowner's active control. The evidence showed that when last seen Hodges had been working in the No. 2 lower tween deck; that he most likely entered the adjacent hold (No. 3) to obtain additional dunnage for work in

the No. 2 hold or for some other legitimate purpose; that the No. 3 hold (the hold where Hodges was ultimately found unconscious) was unlit and therefore dark, and that the hatch through which cargo was loaded and discharged from the lower levels of the hold No. 3 was open and unprotected by ropes or nets; that there was only a partial bulkhead permitting free movement between the No. 2 and No. 3 holds at the upper tween deck level; that in order to get from the No. 2 lower hold to the weather deck it was necessary to go through the No. 3 hold at the upper tween deck level; that a manhole opening in the No. 3 lower tween deck was approximately four feet from the location where Hodges or any longshoreman would have to emerge from the No. 2 lower tween deck to the No. 3 upper tween deck; and other facts from which the jury could find that it was reasonably foreseeable that someone would get hurt traversing the No. 3 tween deck area.

On the "active control" issue, evidence was presented from which the jury could conclude that work had been completed in the No. 3 hold at approximately 2:00 p.m. on the afternoon of July 25, 1977; that the chief mate of the vessel was the last to inspect the hold; that the hatch covers at the No. 3 upper tween deck level were intentionally left open for the convenience of the vessel in receiving and discharging cargo at the next port of call; that control of the permanent lighting in the No. 3 hold was exclusively the responsibility of the ship's crew; that the ship's crew in fact turned off the lights in the No. 3 hold on the day in question; that the opening and closing of hatch covers on intermediate decks as well as on weather decks was exclusively a job performed by the ship's crew before commencement of operations, during operations and after operations were completed;

and that the stevedore gang boss did not know the location of the permanent light fixtures on the vessel.

The trial court denied Respondent's Motion for Directed Verdict, stating that jury issues were raised as to the shipowner's liability for failing to take steps to either close the hatches or protect the opening at the No. 3 hold. App. D at 46a. The instructions to the jury indicate that the trial court viewed the case as one involving liability of the shipowner for injuries occurring in areas or by equipment under the active control of the shipowner during the stevedoring operation. App. C at 38a. No instruction was given based on that portion of the Scindia opinion regarding the limited duty of the shipowner to intervene to stop dangerous conditions within the confines of the cargo operation assigned to the stevedore. However, the jury was advised that the shipowner had no

duty to superintend or oversee the stevedore operation. App. C at 42a.

On February 14, 1984, the jury decided in favor of Petitioners, finding (1) that Evisea was negligent; (2) that Hodges was 20 percent contributorily negligent; and (3) that the total damages sustained amounted to $1,000,000. Evisea filed alternative Motions for Judgment N.O.V. and for a New Trial. On December 13, 1984, the trial court, by order without a written opinion, denied the post-trial motions. On January 4, 1985, defendant, Evisea, filed a Notice of Appeal.

On Appeal, the Fourth Circuit reversed the judgment and remanded for a new trial, concluding that although the evidence presented was sufficient to support the jury's verdict, the jury did not receive proper instruction on the duties imposed by the LHWCA on shipowners and stevedores. Hodges v. Evisea Maritime Co., 801 F.2d 678 (4th Cir. 1986). The portions of the

the Fourth Circuit's opinion which Petitioners contend are inconsistent with this Court's holding in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), and other circuit court decisions include the following statements of law:

> The owner may also be liable if it becomes actively involved in the cargo operation and causes injury by its negligence, or if during the cargo operations it negligently fails to intervene to eliminate or warn of hazards in areas under the active control of the vessel. . . .
> . . . .
> . . . Before a shipowner can be said to have a duty to correct or warn of a condition arising during the cargo operation, the owner must be chargeable both with knowledge of the condition and with knowledge that despite the danger, the stevedore is continuing its operations.
> . . . .
> . . . Evisea was entitled to the substance of an instruction that even if it knew of the danger posed by the open hatch and the unlit hold, it would nevertheless not be negligent in failing to intervene in the stevedoring operation if it did not also know that the stevedore was itself imprudently disregarding the danger.

Hodges, 801 F.2d at 686-87, App. A at 30a - 34a (footnote omitted).

On October 29, 1986, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing En Banc. App. B.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF SHIPOWNER LIABILITY TO LONGSHOREMEN IN CONFLICT WITH A DECISION OF THIS COURT AND DECISIONS OF THE THIRD, FIFTH, SEVENTH AND NINTH CIRCUITS.

The opinion of the Fourth Circuit stands for the proposition that even where a shipowner itself creates a dangerous condition in an area under its own active control, liability will not attach unless an injured longshoreman can prove that the shipowner had actual knowledge of the dangerous condition and that the stevedore was not acting to correct the dangerous condition created by the shipowner.

Petitioners contend that describing the shipowner's duty as one of "intervention" to correct hazards of its own making is illogical and was not a concept introduced by this Court in Scindia. The primary rule of law in Scindia was designed to relieve the shipowner of its duty of supervision and inspection with regard to dangerous conditions that develop "within the confines of the cargo operations that are assigned to the stevedore," 451 U.S. at 172, not those areas of the ship which remain under the shipowner's active control.

The proposition advanced by the Fourth Circuit is contrary not only to Scindia but also positions expressed by the Third, Fifth, Seventh and Ninth Circuits in Sarauw v. Oceanic Navigation Corp., 655 F.2d 526 (3d Cir. 1981), cert. denied, 456 U.S. 914 (1982); Hartford Accident & Indem. Co. v. Oceancarrier Shipholding of Belgium N.V., 799 F.2d 1093 (5th Cir. 1986);

United States Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022 (7th Cir. 1982); and Davis v. Partenreederei M/S Normannia, 657 F.2d 1048 (9th Cir. 1981).

In Sarauw, the Third Circuit held that the shipowner, who customarily retains control of the gangway, was liable for a longshoreman's injury resulting from the shipowner's failure to adjust a small gangway at the tanker's side during cargo operations. The Third Circuit viewed the gangway as not being an appliance "within the confines of the cargo operation," 655 F.2d at 528, but rather one which remained under the vessel's active control and therefore falling within an exception "to the freshly promulgated policy against holding the shipowner responsible" set forth in Scindia. Id. at 529 (Adams, J., concurring).

The Fifth Circuit, in Hartford Accident & Indem. Co., supra, held that where a longshoreman was injured by the active involvement of the crew

in closing a hatch cover while the longshoreman was standing on the coaming, it was not necessary to prove actual knowledge of the danger by the crew and the shipowner's actual knowledge that it could not rely on the stevedore. The court said:

> It is patent, however, that the Scindia statement requiring actual knowledge of hazard, refers to injuries that occur "within the confines of the cargo operations that are assigned to the stevedore."

Hartford Accident & Indem. Co., 799 F.2d at 1097 (footnote omitted).

The Seventh Circuit, in United States Fidelity & Guar. Co., supra, also recognized that the holding of Scindia did not apply to injuries occurring in non-work areas which remain under the active control of the shipowner:

> [T]he Court [in Scindia] noted that if the shipowner "fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation," he is liable under

> the negligence standard of section 905(b). 451 U.S. at 167, 101 S.Ct. at 1622. This is dictum, but so obviously right that we accept it unhesitatingly as an authoritative statement of the shipowner's duty in such circumstances.

United States Fidelity & Guar. Co., 683 F.2d at 1025.

Although the Seventh Circuit upheld a jury finding of no shipowner liability for a longshoreman's injury due to a fall through an open hatch in an unlit hold, the court clearly upheld the applicability of familiar standards of due care rather than the "duty to intervene" language of Scindia.

In Davis, supra, the Ninth Circuit held that where an instrumentality of the ship such as a gangway and its positioning proximately cause an accident, the vessel can be held liable under Scindia even though "control" of the gangway is shared with the stevedore. In Davis, the shipowner swung out the gangway at an angle from

the side of the ship onto the pier. As a consequence, a longshoreman was injured while departing the vessel on the gangway because of its proximity to stevedoring operations. The court found that the shipowner had a "continuing responsibility" with respect to the gangway. 657 F.2d at 1052.

The reasoning of these cases applies with equal force to all areas of the vessel such as hatches, holds, passageways or any areas adjacent to or not a part of the actual work area assigned to the stevedore.

This issue is of importance and worthy of review by this Court because it involves federal law, the development of which is particularly within the province of this Court. Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

Much disagreement continues to exist as to the meaning and application of § 905(b). It is significant to note that, five years after the Scindia decision, even the Fourth Circuit considered texts to which federal judges routinely refer for guidance on jury instructions to be in a state of uncertainty. See Hodges, 801 F.2d at 687 n. 3, App. A at 34 n. 3.

Permitting the Fourth Circuit ruling to stand is to encourage an unwarranted extension of the limitations imposed upon recovery against shipowners to injuries occurring not only in areas under the control of the stevedore but also in areas under the control of the shipowner. To relieve or limit the shipowner's liability for negligence of the stevedore is one thing; to relieve the shipowner of liability for its own negligence in areas of the vessel not assigned to the stevedore is quite another.

The practical effect of the Fourth Circuit's holding is to make the stevedore the guarantor of the safety of all longshoremen no matter how or where they are injured on vessels if injured during cargo operations. To do so is tantamount to introducing assumption of risk as a defense in § 905(b) actions. The longshoreman assumes not only the risk of the shipowner's active negligence but also the risk of the stevedore's negligence in failing to detect dangerous conditions created by the shipowner in areas under the shipowner's active control. The employment of assumption of risk as a defense in § 905(b) actions was clearly not intended by Congress or this Court. See Scindia, 451 U.S. at 168 n. 14.

It is quite possible to instruct the jury that the stevedore has the primary duty to protect longshoremen from danger without imposing the limitation in all cases that longshoremen must prove the shipowner's actual knowledge of

the dangerous condition and of the stevedore's improvident failure to protect its longshoremen from the condition.

Petitioners contend that the trial court's instruction below did so satisfactorily. The duty to intervene instruction is not required or appropriate where the case is one involving injuries occurring in areas under the active control of the vessel. While it may be appropriate in cases where it is uncertain whether or not the injury occurred in an area under the active control of the shipowner to instruct the jury on two separate standards of shipowner liability, Petitioners do not read the present Fourth Circuit opinion as allowing this choice to the court. It is apparent from the Fourth Circuit's opinion that the question whether the injury occurred in an area under the active control of the shipowner was an issue fairly presented by the facts. However, the

opinion, while referring to model instructions 85-5 to 85-7 from 4 L. Sand, J. Siffert, S. Reiss, J. Sexton & J. Thorpe, Modern Federal Jury Instructions ¶85.01 (1985), omits reference to an "active control" instruction within the very same text. Id. (instruction 85-12). The Fourth Circuit's opinion is therefore infirm and should be reversed.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1107

Gary T. Hodges and Liberty
Mutual Insurance Company,

Appellees,

versus

Evisea Maritime Co., S.A.,

Appellant,

and

Concordia Line,

Defendant

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge. (C/A 79-1244)

Argued June 5, 1986. Decided September 22, 1986

Before RUSSELL and PHILLIPS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

John H. West, III and David B. Hamilton (Ober, Kaler, Grimes & Shriver on brief) for Appellant; David Skeen (Stephen F. White; Wright, Parks, Constable & Skeen on brief) for Appellee.

PHILLIPS, Circuit Judge:

Evisea Maritime Co., S.A. (Evisea) appeals from a judgment entered upon a verdict awarding damages to Gary Hodges and the Liberty Mutual Insurance Company (Liberty Mutual). Evisea contends that under § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), it could not properly be found liable for injuries suffered by Hodges upon a vessel owned by Evisea. Evisea therefore argues that the district court erred in refusing either to direct a verdict or to grant judgment notwithstanding the verdict in its favor. Alternatively, Evisea argues that the district court misinstructed the jury, and therefore erred in denying Evisea's motion for a new trial. Although we find that the evidence adduced at trial sufficed to support the jury's verdict, we agree that the jury did not receive proper instruction on the duties imposed by the LHWCA upon shipowners and stevedores, and

therefore reverse the judgment and remand for a new trial.

I

On July 26, 1977, the M/V Concordia Sky was engaged in cargo operations in Newport News, Virginia, when an unidentified and semi-conscious man was discovered in the No. 3 lower tween deck. The man was wearing a T-shirt or sweatshirt, sweatpants, and tennis shoes. He was unable to communicate, and was initially mistaken for a stowaway, but was eventually taken to a hospital. Several days later, he was identified as Gary Hodges, a longshoreman who had worked on the Concordia Sky during its loading in Baltimore on July 25. Evisea is the owner of the Concordia Sky.

An investigation of the circumstances leading to Hodges' presence in the No. 3 lower tween deck was thereafter conducted by Liberty Mutual, the compensation carrier for the

stevedore employing Hodges, Robert C. Herd & Co. (Herd, the stevedore). Although Hodges' co-workers and supervisors were interviewed, no eyewitnesses to Hodges' injury were found. Hodges himself suffered serious head injuries, and claimed a retrograde memory loss leading to an inability to recall anything immediately prior to or regarding his apparent accident. Because Liberty Mutual could not satisfy its statutory burden to show that Hodges' injury was not work related, Hodges was awarded disability benefits paid by Liberty Mutual pursuant to the LHWCA.

Hodges subsequently sued Evisea and the charterer of the Concordia Sky, Concordia Line, alleging that the ship's negligence caused his injuries. Liberty Mutual intervened as a plaintiff to recover its interest pursuant to 33 U.S.C. § 933 (1982). Hodges' theory of negligence turned primarily on his assertion that prior to his injuries he was working in the

ship's No. 2 hold, that he returned to the previously loaded No. 3 hold to obtain additional dunnage, and fell through an open hatch on the No. 3 upper tween deck. Hodges asserted that the vessel was negligent both in leaving the hatch open and in failing to provide adequate lighting or other safety measures that would have prevented the fall.

The district court entered summary judgment in favor of the defendants, but during the pendency of Hodges' appeal from that ruling, the Supreme court decided Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), which clarified the relative duties of shipowners and stevedores within the context of § 905(b) of the LHWCA. Because the district court had not had the opportunity to consider the decision in Scindia when it ruled on the summary judgment motion, this court vacated the summary judgment order insofar as it related to Hodges' claims of

negligence, and remanded the case for further proceedings. In our unpublished opinion, we observed that "[f]or the purposes of the summary judgment motion," Hodges was entitled to a permissible inference from the forecast evidence of the facts supporting his theory of negligence.

After remand, following a period of discovery, the case proceeded to a jury trial. At the trial, there was no substantial dispute that Hodges had suffered severe injuries, including a fractured skull, retrograde amnesia, and a psychiatric disability. The liability of defendants depended, however, upon a showing by Hodges of sufficient evidence to support his theory that he left the No. 2 hold to obtain dunnage, and that his fall through the No. 3 upper tween deck hatch was attributable to a negligent act or omission of the vessel.

Evisea and Concordia Line defended on the theories that the evidence would show that they did not have a duty to Hodges, that Hodges' theory of the injury was merely speculative, and that the evidence supported their theory that Hodges was in the upper tween deck for a nap, and was not in the performance of his longshoreman duties when he was injured.

Hodges' first witness was Christiansen, Evisea's marine surveyor. Christiansen testified that the No. 2 and No. 3 holds were connected at the upper tween deck level, that the lights in No. 3 may or may not have been operative, that the hatch in No. 3 was open during the Baltimore loading operations, and that the hatch was four feet from the entrance from No. 2 to No. 3 and large enough for a man Hodges' size to fall through.

Gross, a longshoreman and friend of Hodges, was working with him on the day of the accident.

He testified that Hodges had been dressed in sweats and a T-shirt before he disappeared, that Hodges' job was to obtain dunnage when needed, that dunnage had often been needed that day, that there was extra dunnage in No. 3 after they finished work there, and that a need for more dunnage in No. 2 had been expressed before Hodges disappeared. Gross testified that he originally thought that Hodges had left to get dunnage, but that he later assumed that Hodges, who rode a bicycle ten miles to work each day, must have left to go home because it was raining. Gross also testified that when the weather deck hatch covers were closed, there was very little light in the holds, and that the cluster lights brought in to light the No. 2 hold would not have illuminated No. 3. He said that he thought it was the usual practice, once a hold had been loaded, to close all the decks to avoid the danger of a fall, so that he would not have

expected the hatch on the No. 3 upper tween deck to be open.

Gill, another longshoreman, testified that when he last saw Hodges he was looking for dunnage, that when more dunnage was needed they would often go to other holds and decks to find it, and that No. 3 was poorly lit. He substantiated the theory that at the time Hodges was hurt, he might have been looking for dunnage. He testified that the gang had looked for Hodges before they left, but may not have seen him in No. 3 because it was dark.

Two doctors also testified for Hodges. Dr. McAdam stated that Hodges' head injury was consistent with either a fall or being struck with a blunt instrument (which was one of defendants' theories). Dr. McAdam also stated that the injuries were consistent with Hodges' claim of amnesia. Dr. Oror testified that the likely cause of the injury was a fall, and that

Hodges could not have been hit with a blunt instrument because there was no evidence of a depression at the injury site.

There was further testimony that when Hodges was found at Newport News, there were blood stains on the No. 3 ladder and on the area of the deck where Hodges was found. Longshoremen from Newport News also testified that the lighting in No. 3 was inadequate, and that they had to obtain cluster lights before they removed Hodges from the hold on the afternoon of July 26.

Other testimony disclosed that for safety reasons it was customary to close hatches once a hold had been loaded, that the opening and closing of hatch covers was the job of the vessel's crew, and that the hatch covers in No. 3 were left open for the convenience of the vessel (because it would avoid having to reopen them the next day in Newport News). Defendants had indicated during discovery that the lights in

the No. 3 hold were not on at the time Hodges suffered his injuries.

At the close of Hodges' evidence, both defendants moved for a directed verdict. The district court granted the motion of Concordia Line, but denied that of Evisea, which proceeded as the sole defendant.

Two of Hodges' supervisors, Amos, the gang leader, and Der, the foreman, testified for Evisea. Der stated that the longshoremen were responsible for obtaining dunnage, and that they often went to other levels of the ship to obtain it. He testified that it was the responsibility of the vessel to close hatches and turn lights on and off. He observed that the ship's crew had closed the No. 3 weather deck hatch on July 25, and that the stevedore usually placed ropes or nets around an open hatch as a safety measure, but that at the time of Hodges injury the No. 3 hold was no longer a work area. Der and Amos

both testified that they knew of the open hold, but Der also apparently thought that the hatch presented no danger because he thought the lights were on in No. 3. Amos and Der also expressed their belief that there was not a need for more dunnage in No. 2, and that the work was completed without additional dunnage.

Amos testified, as had Gill earlier, that when last seen on July 25, Hodges was wearing a dark shirt, shorts, gloves, safety shoes, and a hardhat. These clothes were never located, and as already mentioned, Christiansen had described Hodges as being in the different clothes in which he was found. Evisea's theory was that Hodges had changed clothes in preparation for his bike ride home. Amos testified that he thought Hodges had left to take a nap, and Gross and Gill had testified that Hodges wore gloves when handling dunnage.

Amos also stated that the vessel's crew had responsibility for control of the lights. Additional evidence indicated that the ship's crew was not present in the stevedoring work area, and that no safety complaints were received from the longshoremen. Representatives of the vessel had testified that because work in the No. 3 hold was complete, they had no expectation that the longshoremen would return there.

At the conclusion of the presentation of its evidence, Evisea renewed its motion for a directed verdict, which the district court denied. The district court also rejected several proposed instructions proffered by Evisea. The jury decided in favor of the plaintiffs, and, in answer to written interrogatories, found (1) that Evisea was negligent; (2) that Hodges was twenty percent contributorily negligent; and (3) that the total damages sustained amounted to $1 million. Reduced by the degree of Hodges'

contributory negligence, this verdict resulted in the entry of judgment against Evisea in the amount of $800,000. Evisea thereafter filed motions for judgment n.o.v. and for a new trial. Those motions were denied, and following the entry of judgment in favor of Hodges and Liberty Mutual, Evisea took ths appeal.

II

Evisea first argues that the district court erred in refusing to grant its motions for directed verdict and for judgment n.o.v. Evisea asserts that it was entitled to judgment because the evidence at trial showed neither that it owed a duty to Hodges nor that Hodges' injuries were the result of a breach of duty by Evisea. Evisea properly observes that the jury verdict in favor of the plaintiffs in this case must be based on inferences within the range of substantial or reasonable probability, see Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 242

(4th Cir. 1982). We disagree with Evisea's contention that the evidence in this case did not permit such inferences, however, and we conclude that it was not error for the district court to deny Evisea's motions for directed verdict and judgment n.o.v. The jury could, on the evidence before it, find both the existence of a duty and Evisea's breach of it, so that the verdict was within the range of permissible inference.

The 1972 amendments to the LHWCA eliminated the right of longshoremen to recover from a shipowner for acts caused by unseaworthiness, and limited the right to recover to those injuries caused by the shipowner's negligence. Congress left the determination of the applicable standard of negligence to the courts. In Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), the Supreme Court wrote to clarify the relative duties of shipowners and stevedores under the LHWCA. Rejecting the land-based

negligence standards applied by some courts, the Supreme Court concluded that § 905(b) of the LHWCA does not impose upon the shipowner a continuing duty to inspect the cargo operations once the stevedore has begun work. Rather, prior to the commencement of stevedoring operations, the shipowner must "at least" exercise ordinary care under the circumstances to have the ship in such a condition that an experienced stevedore, with the exercise of reasonable care, can carry out its operations. The shipowner must warn the stevedore of hazards that are or should be known to the vessel, if the hazards are not known or should be known to the stevedore. The vessel is also liable, after the stevedoring work has begun, if it actively involves itself in the cargo operations and its negligence causes an injury, or if it fails to exercise due care to intervene to protect longshoremen from hazards under the active control of the vessel during

the stevedoring operation. 451 U.S. at 166-68.

Thus, Evisea's liability in this case must arise from its turning over of the vessel to the stevedore in a dangerous condition, from its negligence while actively involved in the stevedoring operation, or from its failure to exercise due care with regard to hazards in an area under its control. Evisea contends that it was entitled to a directed verdict or to judgment n.o.v. under these principles from Scindia because there was not sufficient evidence to support a finding of its liability under any of these theories. We disagree with this assessment of the evidence.

Although there was no evidence upon which the jury could find that Evisea had turned the ship over to Herd in a dangerous condition, there did exist evidence from which the jury could conclude that the vessel had a duty to intervene and exercise its control over the No. 3 hold to

eliminate the dangerous conditions of the open hatch and poor lighting. That the hatch was open and the hold unlit is not in dispute, and there was sufficient evidence of control by Evisea to create a jury issue. Although the holds had been turned over to the stevedore, the ship's crew knew that loading in the No. 3 hold was complete, and had closed the weather deck hatch. There was testimony that it was the duty of the vessel to see to the closing of the hatches, and further testimony that the hatch in No. 3 was left open for the convenience of the ship. The stevedore disclaimed knowledge of how to control the lights in No. 3, and there was evidence that the crew had earlier turned the lights off. This testimony, considered in the light most favorable to Hodges, created a permissible inference that the vessel was in sufficient control of the No. 3 hold to give rise to a duty under Scindia.

Having concluded that the jury could find a duty of intervention under Scindia, we must repair to more general concepts of negligence to determine if there was sufficient evidence of a breach of the duty. Evisea also argues that, as a matter of law, it did not breach any duty owed to Hodges because it could not foresee that he would reenter the No. 3 hold, because the danger was apparent and hence there was no obligation to warn, and because the negligence of Hodges and/or the stevedore should be viewed as the sole proximate cause of Hodges' injuries.

Because the stevedore had reported to the crew that the loading was complete in the No. 3 hold, the vessel may have assumed that the longshoremen were finished there, and that they would not reenter the compartment. The lights were turned off, and the upper tween deck hatch left open. From this evidence, Evisea argues that a fall by Hodges was not foreseeable. This

question was properly for the jury, however. The two holds were connected, so it could be seen as not unusual that a longshoreman would enter a hold where loading was complete to obtain dunnage for use in the connected hold. Moreover, there was at trial at least a dispute as to whether the vessel had been actually informed that no further work would be done in the No. 3 hold.

Evisea also asserts that the jury should not have been permitted to find negligence because the apparent danger of the dark hold eliminated any duty of Evisea to warn of the danger. But we agree with the reasoning in two cases decided prior to Scindia which upheld findings of shipowner liability on similar open-hatch facts, see Johnson v. A/S Ivarens Rederi, 613 F.2d 334 (1st Cir. 1980); Badalamenti v. United States, 160 F.2d 422 (2d Cir. 1947), and if the jury could properly find that Evisea had control over the relevant area, this question was also

properly for the jury. It was arguably foreseeable to the shipowner that a longshoreman would enter the darkened No. 3 hold and fall through the hatch, and the longshoreman's negligence in entering the darkened hold might not wholly or even partially insulate the independently negligent act of leaving the hatch open. United States Fidelity & Guaranty Co. v Jadranska Slobodna Plovidba, 683 F.2d 1022 (7th Cir. 1982), is not to the contrary. In that case, the court held that under similar facts a jury could find a shipowner not negligent. The court did not hold, however, that the evidence in that case would not have supported any contrary verdict, or that the question was not for the jury at all.

Finally, Evisea argues that because there was no evidence that directly substantiated Hodges' theory of the accident, the verdict was based upon impermissible speculation. Hodges

asserted that the injury occurred while he was in the No. 3 hold searching for dunnage. Although the evidence arguably supported other theories as well, there was evidence that justified Hodges' account of the injury. The trial testimony included evidence from Hodges' co-workers that dunnage was needed and that they thought Hodges had left to find dunnage. There was also testimony to the effect that the No. 3 hold was too dark for Hodges to see the open hatch, that the hatch was of sufficient size for Hodges to have fallen through it, that Hodges was found on the lower tween deck, and that blood stains were present on the ladder between the upper and lower tween decks. Upon this evidence, the jury could find Evisea liable by inferences within the range of reasonable probability, and the district court properly refused either to grant a directed verdict or judgment n.o.v.

III

We turn next to Evisea's contentions that the court erred in its instructions to the jury on the issue of the relative duties of stevedores and shipowners once stevedoring operations are underway.

After instructing the jury on general principles of negligence, the district court properly described the shipowner's duty to turn over to the stevedore a safe work place, the initial duty of care described in Scindia.[1/]

---

[1] The court instructed

> The ship owner has a duty with respect to the condition of the ship's work space to be used in the stevedoring operation; and, if the ship owner fails to at least warn the stevedore of hidden dangers which would have been known to him in the exercise of ordinary and

(Continued on next page)

(fn. 1 continued)
reasonable care, the ship owner has breached its duty and is liable if its negligence causes injury to the longshoreman.

A ship owner's duty to provide longshoremen with a reasonably safe place to work is confined to those areas of the vessel where longshoremen may be reasonably expected to go. If you find that the defendant could not reasonably hae [sic] foreseen that Mr. Hodges would enter the number three cargo area on the evening of July 25, 1977 or thereafter, you must find that the defendant had no duty with respect to Mr. Hodges in that area. If you find that Mr. Hodges was injured whie [sic] in the number three hatch, he has the burden to show that he was in the number three hatch for a legitimate purpose. If Mr. Hodges fails to meet this burden, you may weigh that fact when considering whether it was reasonably foreseeable for him to be in the number three cargo area on the evening of July 25, 1977.

An accident that is unprecedented or extraordinary is not necessarily unforeseeable. If you find that the defendant could not have reasonably foreesseen [sic] that Mr. Hodges would enter the number three hatch in the course of the longshoring cargo operation in the number two hatch, you must find taht [sic] the defendant had no duty with respect to Mr. Hodges and, therefore, was not negligent with respect to him.

(Continued on next page)

The court refused, however, to give extensive instructions proffered by Evisea that were designed to describe the relative duties of the stevedore and vessel once the stevedoring operation has commenced.[2/] The sole

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(fn. 1 continued)

> The ship owner is not a guarantor or insurer of the safety of the premises of the vessel. On the contrary, the ship owner is entitled to assume that longshoremen who are working aboard their essel [sic] will see and observe that which wuld [sic] be obvious through reasonably to be expected use of an ordinary person's senses. So, there is no duty to give a longshoreman such as Mr. Hodges notice of an obvious danger or a danger that would be apparent to the reasonably prudent person exercising ordinary care under the circumstances, as shown by the evidence in this case, unless the ship owner should have anticipated the harm despite such knowledge or obviousness.

[2] These tendered instructions often paraphrased or quoted from Scindia:

> 19. The shipowner is under a duty to exercise ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by their exercise of reasonable

(Continued on next page)

(fn. 2 continued)
care to load and discharge the cargo with reasonable safety to persons and property and to warn the stevedore of any hazard which would likely be encountered by the stevedore but which is not known or obvious to the stevedore or reasonably to be anticipated by the stevedore if reasonably competent in the performance of its work. . . .

20. The shipowner is under a duty to give warning to the stevedore of any hazards on the ship or with respect to ship's equipment that are known to the shipowner, or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of the loading or discharging operation, but which are not known by the stevedore and would not be obvious to or anticipated by the stevedore if reasonably competent in the performance of its work. Therefore, if you find that there was a hazard on the vessel which caused Mr. Hodges injury and if you also find that the stevedore, Robert C. Herd & Co., knew or should have known of the hazard, then there was no duty on the part of the shipowner to give a warning of such hazard. . . .

23. As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen such as the plaintiff to unreasonable hazards. . . .

(Continued on next page)

(fn. 2 continued)

> 24. It is the stevedore's statutory duty, in the first instance, as the employer of the longshoremen, to provide a reasonably safe place to work and to take such safeguards with respect to equipment and working conditions as may be necessary to avoid injury to the longshoremen. The shipowner is not the employers [sic] of the longshoremen and were [sic] not the employers [sic] of Mr. Hodges and, therefore, did not owe such a statutory duty to him. . . .
>
> 26. In the allocation of duties between the shipowner and the stevedoring company, it is the stevedoring company that is assumed to be expert and experienced in the work of loading and discharging cargo and to be aware of the risks and hazards which are normally to be found on a ship. The stevedore is expected and obligated to load and discharge cargo and perform all the functions relating to loading and discharging safely, properly and in a workmanlike manner in accordance with the skill and knowledge required of the stevedore. The shipowner has no duty to superintend or oversee the operations of the stevedoring company or its employees. . . .
>
> 27. The primary responsibility for the safety of Mr. Hodges is that of his employer, the stevedore, Robert C. Herd & Co., Inc. If you find that Robert C. Herd & Co., Inc. reasonably fulfilled this responsibility to Mr. Hodges, then,

(Continued on next page)

instruction given by the court that touched on the division of responsibility between the vessel and the stevedore during ongoing operations was this:

> It is not contended by the plaintiffs that the ship owner had a duty to superintend or oversee the operations of the stevedoring company or its employees, and the ship owner in fact had no such duty under the facts of this case.

(fn. 2 continued)

> likewise you should find that the shipowner was not responsible for any injuries to Mr. Hodges. . . .
>
> 28. The only duty that a shipowner has with respect to the operations of the stevedore is a duty to prevent harm that may result from an obviously improvident failure of the stevedore to take such proper precautions in the face of an obvious and unreasonable danger if the owner knows of the danger and of the stevedore's failure to prohibit its personnel from exposure to the danger. If the danger is known to the stevedore and the owner has no reason to believe that the stevedore will not take precautions to prohibit its personnel from exposure to said danger, then the owner cannot be liable for any injury to the longshoreman occasioned as a result of said danger. . . . [Citations omitted.]

That is an unexceptional statement of the law and evidence so far as it goes, but we think it does not go far enough.

In Scindia, as indicated, the Supreme Court was primarily concerned to define the duties of care owed by shipowners to longshoremen under § 905(b) of the LHWCA, which had been amended by Congress in 1972 specifically to reallocate the responsibility for injuries to longshoremen. The 1972 amendments both eliminated the right of a longshoreman to recover from the vessel for injuries attributable to unseaworthiness, and ended the shipowner's right to recover from the stevedore in a third-party action. The longshoremen's cause of action that emerged was for the shipowners' negligence, and in Scindia, the Court was primarily concerned to define the circumstances under which the shipowner is under any duty of care running to the longshoremen. As discussed above, the shipowner is responsible to

exercise due care to turn over to the stevedore a workplace that is free of hidden dangers, or to warn the stevedore of such dangers if they exist. The owner may also be liable if it becomes actively involved in the cargo operation and causes injury by its negligence, or if during the cargo operations it negligently fails to intervene to eliminate or warn of hazards in areas under the active control of the vessel. Scindia, 451 U.S. at 166-68; Kakavas v. Flota Oceanica Brasileira, S.A., 789 F.2d 112, 118-19 (2d Cir. 1986) (Friendly, J.); see generally Note, A Review of Shipowners' Statutory Duty Under § 905(b) of the Longshoremen's and Harborworkers' Compensation Act: Does Scindia Require a Change in Course?, 1983 Duke L.J. 153 (1983) (parameters of shipowner's duty after Scindia); Note, The New Negligence Standard for Shipowners and Longshoremen - Scindia Steam Navigation Co. v. De Los Santos, 13 Loyola

U.L.J. 83, 92-105 (1981) (scope of duties described in Scindia).

The "basis thrust" of Scindia is therefore that the "primary burden [is] on the stevedore for avoiding injuries caused by obvious hazards," see 451 U.S. at 180 (Powell, J., concurring), and each of the potential shipowner duties outlined in Scindia exists only as a supplement to the duty of the stevedore so to supervise its longshoremen that injuries will not result from obvious or warned-of defects of the vessel or its equipment. In the instant case, there was evidence supporting Evisea's theory that if the open hatch and unlit hold were dangerous conditions, they were conditions that arose during the stevedore's cargo operations and that were as much within the stevedore's actual or constructive knowledge as the shipowner's. Evisea was therefore entitled to proper instruction on the limitations of its duty to

longshoremen in respect of these particular conditions during the cargo loading operations.

The district court did instruct the jury that Evisea had no duty to "superintend or oversee," but, as indicated, this brief instruction did not adequately reflect the limits of the owner's duties under § 905(b) as defined in Scindia. Before a shipowner can be said to have a duty to correct or warn of a condition arising during the cargo operation, the owner must be chargeable both with knowledge of the condition and with knowledge that despite the danger, the stevedore is continuing its operations. See Scindia, 451 U.S. at 175-76. If the shipowner may reasonably believe, despite its own knowledge of the danger, that the stevedore will act to avoid the dangerous conditions, the owner cannot be said to have been negligent, for the decision whether a condition imposes an unreasonable risk of harm to longshoremen is "a

matter of judgment committed to the stevedore in the first instance." Id. at 175.

> [T]he legal duties placed on the stevedore and the vessel's justifiable expectations that these duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court, and where appropriate the jury, should thus be made aware of the scope of the stevedore's duty under the positive law.

Id. at 176.

In this case, the district court declined to give requested instructions that were directed specifically to the allocation of duties of care with respect to dangerous conditions between the vessel and stevedore during ongoing stevedoring operations. Although the requested instructions need not have been given in the exact form and great detail presented, they sufficed to alert the district court that the charge as given was inadequate under Scindia. The evidence required a more detailed instruction describing the limits of the shipowner's duty to intervene during the

cargo operation in respect of the danger posed by the open hatch and unlit hold. Evisea was entitled to the substance of an instruction that even if it knew of the danger posed by the open hatch and the unlit hold, it would nevertheless not be negligent in failing to intervene in the stevedoring operation if it did not also know that the stevedore was itself imprudently disregarding the danger.[3/] See Scindia, 451 U.S. at 175 (no shipowner liability if stevedore's "obviously improvident" exercise of judgment not known); Kakavas, 789 F.2d at 120

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[3] Compare, e.g., the model instructions fully describing the vessel's duties under Scindia in 4 L. Sand, J. Siffert, S. Reiss, J. Sexton & J. Thorpe, Modern Federal Jury Instructions ¶ 85.01, instructions 85-5 to 85-7 (1985) with the model instructions in E. Devitt and C. Blackmar, Federal Jury Practice and Instructions (3d ed. 1977), which recently have been withdrawn as inadequate. Id. § 96.35 (Supp. 1986). See also Kakavas, 789 F.2d at 120 (contrasting the two sets of model instructions to illustrate comparable error).

(failure to give such an instruction in comparable case reversible error); Hunter v. Reardon Smith Lines, 719 F.2d 1108, 1112-13 (11th Cir. 1983) (same).

IV

In summary, we hold that although the evidence sufficed to support a jury verdict against Evisea on a theory of negligent failure to intervene, Evisea was prejudiced by the district court's failure properly to instruct the jury on that issue. We therefore affirm the district court's refusal to direct a verdict or grant judgment notwithstanding the verdict for Evisea, but we reverse and remand for a new trial because of the faulty jury instruction.

REVERSED AND REMANDED FOR A NEW TRIAL

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1107

Gary T. Hodges, et al.

Appellees,

versus

Evisea Maritime Co., S.A.,

Appellant,

and

Concordia Line,

Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court

requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Russell and Judge Butzner.

For the Court,

/S/ John M. Greacen
Clerk

APPENDIX C

EXCERPTS FROM ORAL INSTRUCTIONS TO THE JURY GIVEN BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Now, I have referred to negligence a lot of times. What is negligence? Negligence is defined as an act or omission which creates an unreasonable risk of harm. Generally, the risk of harm is not unreasonable and the conduct which gives rise to the risk is not negligence if the injury which results is not reasonably foreseeable. In the context of this case negligence is, in other words, the failure to use ordinary care under the circumstances on the part of the ship to avoid exposing longshoremen to harm from hazards they may encounter in areas under the active control of the vessel during the stevedoring operation.

Ordinary care is defined to be that degree of caution, attention, activity, and skill which is habitually employed by or may reasonably be

expected from persons in the situation the respective parties were in, given all of the circumstances surrounding them at the time.

The ship owner has a duty with respect to the condition of the ship's work space to be used in the stevedoring operation; and, if the ship owner fails to at least warn the stevedore of hidden dangers which would have been known to him in the exercise of ordinary and reasonable care, the ship owner has breached its duty and is liable if its negligence causes injury to the longshoreman.

A ship owner's duty to provide longshoremen with a reasonably safe place to work is confined to those areas of the vessel where longshoremen may be reasonably expected to go. If you find that the defendant could not reasonably have foreseen that Mr. Hodges would enter the number three cargo area on the evening of July 25, 1977 or thereafter, you must find that the defendant

had no duty with respect to Mr. Hodges in that area. If you find that Mr. Hodges was injured while in the number three hatch, he has the burden to show that he was in the number three hatch for a legitimate purpose. If Mr. Hodges fails to meet this burden, you may weigh that fact when considering whether it was reasonably foreseeable for him to be in the number three cargo area on the evening of July 25, 1977.

An accident that is unprecedented or extraordinary is not necessarily unforeseeable. If you find that the defendant could not have reasonably foreseen that Mr. Hodges would enter the number three hatch in the course of the longshoring cargo operation in the number two hatch, you must find that the defendant had no duty with respect to Mr. Hodges and, therefore, was not negligent with respect to him.

The ship owner is not a guarantor or insurer of the safety of the premises of the vessel. On

the contrary, the ship owner is entitled to assume that longshoremen who are working aboard their vessel will see and observe that which would be obvious through reasonably to be expected use of an ordinary person's senses. So, there is no duty to give a longshoreman such as Mr. Hodges notice of an obvious danger or a danger that would be apparent to the reasonably prudent person exercising ordinary care under the circumstances, as shown by the evidence in this case, unless the ship owner should have anticipated the harm despite such knowledge or obviousness.

Proof of adherence to an industry practice or custom by itself is not dispositive on the issue of negligence. Merely because a practice has been continued for a long period of time does not necessarily mean that the practice is reasonably safe under all circumstances. The mere fact that long practice permits a hazardous

condition to exist does not exonerate one from negligence, for long accepted practices may be unsafe practices.

In considering the issue of negligence of the vessel, you may balance the usefulness to the vessel of the dangerous condition and the burden involved in curing it against the probability and severity of the harm it poses.

It is not contended by the plaintiffs that the ship owner had a duty to superintend or oversee the operations of the stevedoring company or its employees, and the ship owner in fact had no such duty under the facts of this case.

It is the burden of the plaintiffs, as I have said, to establish the negligence of the defendant by a preponderance of the evidence. It is also the burden of the plaintiffs to establish by a preponderance of the evidence that the injuries of Mr. Hodges were proximately related to the claim of negligence of the defendant.

That is, the negligence must be what is customarily called the proximate cause of the injuries complained of. The injury or damage is proximately caused by an act or failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actively causing the injury or damage and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage consisting of only one act or thing or the conduct of only one person. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or damage, and in such a case each may be a proximate cause.

The mere happening of the accident complained of creates no presumption of negligence on the part of the defendant, and the burden is on the plaintiffs to prove by a fair preponderance of the evidence satisfactory to you that the defendant was negligent and that such negligence caused the injuries complained of.

Both of these points must be proved. Thus, if you do not believe that the defendant was negligent, or if you do not believe that such negligence caused the accident, or if the evidence leaves your minds in a state of even balance as to the existence of such negligence on the part of the defendant or as to whether such negligence by the defendant caused the accident, then your verdict must be in favor of the defendant. . . .

. . . .

Whatever duties or liabilities are created for the stevedore under OSHA regulations, that

is, Occupational Safety and Health Administration Regulations, such regulations do not apply to shipowners. That fact, however, does not relieve owners, operators, agents, or masters of vessels who are not employers under the meaning of OSHA from responsibilities or duties otherwise placed upon them by the law of negligence.

APPENDIX D

ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DENYING RESPONDENT'S MOTION FOR DIRECTED VERDICT

The court: Well, I certainly think that it's a case in which the defendant can make a strong argument. However, I think that there is some evidence which is sufficient to create a jury question as to, one, whether or not the lights were on; two, whether or not they could have reasonably anticipated that somebody might be going into the number three tween deck area to get the dunnage or for other legitimate reasons; and that it is a jury question as to whether or not, one, the lights should have been on, if they weren't; and, number two, as to whether other steps should have been taken to either close the hatches or to protect the open hatches on number three, in the number three area. So, I think it's a jury question.

(2)

No. 86-1230

Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY T. HODGES AND
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

v.

EVISEA MARITIME CO., S.A.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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-1312

RULE 28.1 STATEMENT

Respondent, Evisea Maritime Co., S.A., is a Greek Corporation which has no parent company, subsidiaries, except wholly owned subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

QUESTION PRESENTED

Should the Supreme Court decline to review the decision of the Fourth Circuit, which reversed a jury verdict in favor of a longshoreman against a shipowner and remanded the case for a new trial, because the district court failed to instruct the jury consistent with the law established by this Court in *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981)?

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No. 86-1230

In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY T. HODGES AND
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v.

EVISEA MARITIME CO., S.A.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

In this factually unusual case, a longshoreman apparently fell into the hold of a vessel in Baltimore, but was not found until the vessel arrived in Newport News the next day. He could not explain how he got there, and nobody will ever know for certain what happened.

Recognizing that this Court had formulated the relative duties of a shipowner and stevedore under the Longshore and Harbor Workers' Compensation Act (hereafter "LHWCA") in *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981), the Fourth Circuit properly held that the district court must instruct the jury with regard to the shipowner's right to rely on the stevedore, the longshoreman's employer, to control its operation and personnel. There is no need to reexamine this formulation, as it has been well-understood and properly applied by the lower courts with the result that there is no conflict as to the legal issues addressed by the Fourth Circuit in its decision below.

The Respondent, Evisea Maritime Co., S.A. (hereafter "Evisea") wishes to emphasize at the outset that the Petitioners, Gary T. Hodges and Liberty Mutual Insurance Co. (hereafter collectively referred to as "Hodges"), in their Statement of the Case, omit certain evidence presented by Evisea that clearly supports the Fourth Circuit's decision. Evisea showed at trial that the stevedore was aware that the No. 3 tween deck hatch had been left open and that the lights had been turned off only after the stevedore had advised the crew that all work had been completed there, and the crew had closed the No. 3 weather deck hatch. The evidence at trial also showed that after the No. 3 weather deck hatch had been closed, no member of the crew remained in that area or was present in the No. 2 hold, where the stevedore had moved to continue cargo operations, at the time Hodges disappeared. Finally, there was no evidence that the shipowner had knowledge that the stevedore would permit its employees to be in the area of the closed No. 3 hold without fulfilling its obligation to provide lighting to its employees. In short, while both the shipowner and the stevedore knew of the conditions in the No. 3 hold, only the stevedore knew of, and controlled, the movements of its employees into that area.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

In reversing and remanding the case for a new trial under proper instructions, the Fourth Circuit recognized that there was no evidence that Evisea had any knowledge or reason to believe either that Hodges would be venturing into the No. 3 cargo hold long after work had been completed there, or that the stevedore was not properly supervising its men to assure that they remained in their assigned work area. Therefore, it was mandatory that the district court instruct the jury fully and properly on the respective duties of a shipowner and stevedore to a longshoreman once work has begun, i.e., that the primary burden is on the stevedore to avoid injuries to its employees caused by obvious hazards, and that the shipowner is required to intervene only when it has knowledge both that a dangerous

condition exists *and* that, despite the danger, the stevedore is unreasonably continuing its operation. Because the instructions given by the district court were completely inadequate on this crucial point under *Scindia,* the case was properly reversed and remanded. In doing so, the Fourth Circuit fully complied with both the letter and the spirit of *Scindia.* Moreover, its decision is consistent with the decisions of the other circuit courts which have addressed the issue, and there is no other important reason for hearing this case. Accordingly, Evisea respectfully requests that this Court deny the Petition for a Writ of Certiorari.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER JURY INSTRUCTIONS IN A SUIT FOR PERSONAL INJURY BY A LONGSHOREMAN AGAINST A SHIPOWNER ARISING UNDER § 905(b) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND THE DECISION BELOW IS CONSISTENT WITH THE LAW OF THIS COURT.

In *Scindia,* this Court explicitly held that in suits brought by longshoremen against shipowners, it is imperative for the trial court to instruct the jury that the stevedore, as opposed to the shipowner, has the primary responsibility for the safety of its longshoremen employees; that the shipowner has a justifiable expectation that the stevedore will discharge that responsiblity; and that the shipowner's duty to intervene in the stevedoring operation arises only if it knows of a danger to which the longshoremen would be exposed *and* that the stevedore's unreasonable continuation to work in the face of such danger is obviously improvident. Since *Scindia,* the circuit courts have assiduously followed this rule of law and held that jury verdicts in favor of an injured longshoreman based on instructions which fail to outline the proper allocation of duties between stevedore and shipowner must be reversed and remanded.

While the appeal of this case was pending in the Fourth Circuit, the United States Court of Appeals for the Second Circuit rendered its decision in *Kakavas v. Flota Oceanica Brasileira S.A.*, 789 F.2d 112 (2d Cir.), *cert. denied,* __ U.S. __, 107 S.Ct. 186 (1986). In *Kakavas,* the court reversed and remanded a jury verdict in favor of an injured longshoreman for reasons sub-

stantially similar to the reasoning of the Fourth Circuit. There, the shipowner requested the trial court to instruct the jury concerning the primary burden of the stevedore to protect longshoremen from hazardous conditions that had developed during cargo operations. *Id.* at 119, 120. Instead, the trial court, in direct contrast to the mandate of this Court in *Scindia,* instructed the jury that the shipowner had a continuing duty of care in cargo operations. *Id.* at 116 n.3. Additionally, the trial court instructed the jury according to traditional negligence concepts, as opposed to the relative duties imposed by *Scindia.* Finding error, the Second Circuit reversed and remanded, holding that the instructions were inadequate under *Scindia,* since they misled the jury to believe that the shipowner was required to monitor the stevedore's work.

Earlier, the Eleventh Circuit, addressing the identical issue posed in the instant case, had reached the same conclusion. In *Hunter v. Reardon Smith Lines, Ltd.,* 719 F.2d 1108 (11th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984), a longshoreman contended that the shipowner was liable for his injuries because the accident occurred in an area of the vessel under the active control of the shipowner and, alternatively, during stevedoring operations which were dangerous, with the result that the shipowner should have intervened to protect him. On appeal from a jury verdict entered in favor of the longshoreman, the shipowner contended that the failure of the district court to give instructions with respect to the complete duties of both the shipowner and stevedore was erroneous. The Eleventh Circuit agreed, holding:

> Although the trial court here may have properly charged the jury as to the primary nature of the stevedore's responsibility during cargo operations with respect to the discovery of *unknown* dangers, *it failed to instruct the jury that the stevedore retains the primary responsibility even with respect to dangers which are known to the shipowner. Reardon Smith requested, and was entitled to, such instructions. We thus conclude that the district court erred.* The error is significant because the trial court focussed on Reardon Smith's duty with respect to *known* dangers. The

> Supreme Court in *Scindia* expressly held that the jury should be made aware of the 'duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed.'

Id. at 1112 (quoting *Scindia*, 451 U.S. at 176) (emphasis in original and added); *See also Clark v. Bothelho Shipping Corp.*, 784 F.2d 1563, 1566 (11th Cir. 1986); *Helaire v. Mobile Oil Co.*, 709 F.2d 1031, 1040 (5th Cir. 1983) (jury instructions required concerning stevedore's duties).

The Fourth Circuit's decision approves the proposition that Evisea's theories of defense entitled it to have the jury instructed as to the relative duties outlined in *Scindia* and specifically that the stevedore has the primary responsibility for the safety of its employees during stevedoring operations. As the Fourth Circuit's decision is consistent with the reasoning of both *Kakavas* and *Hunter, see Hodges*, 801 F.2d at 686, there is no conflict between it and the circuit courts addressing the issue presented in Hodges' Petition.

In a further attempt to justify review, Hodges claims that the area of the No. 3 cargo hold was under the "active control" of the shipowner at the time of the accident and, therefore, there was no need for the district court to give the jury instructions called for by *Scindia*. Contrary to the dictates of *Scindia*, Hodges contends that it is unnecessary to instruct the jury that the primary obligation for the safety of longshoremen is that of the stevedore, and the shipowner's duty to intervene only arises when it knows of a danger to which the longshoremen are being exposed by the stevedore. Hodges has cited four cases which purportedly support his position that there is a conflict among the circuits. Not only is Hodges incorrect when he asserts that the area of the No. 3 cargo hold was under the "active control" of the shipowner at the time of the injury, but his reliance on the cases that he cites is misplaced.

In *Davis v. Partenreederei M.S. NORMANNIA*, 657 F.2d 1049 (9th Cir. 1981), a longshoreman was injured when he was struck by cargo being discharged from the vessel, as he walked off the gangway. The court found that once the shipowner ap-

preciated the continuing danger posed by its own positioning of the gangway, it had a duty to intervene and remedy the dangerous condition. In striking contrast, no evidence was presented that Evisea had any knowledge that Hodges would be exposed to the open hatch in the No. 3 upper tween deck.

In *Sarauw v. Oceanic Navigation Corp.*, 655 F.2d 526 (3d Cir. 1981), *cert. denied,* 456 U.S. 914 (1982), the shipowner, who was supposed to place a watch on the gangway which it knew was being used by longshoremen as well as all others traversing to and from the vessel, was held liable, because it should have recognized the defect in the gangway, and intervened to correct it. *Sarauw* is distinguishable because the shipowner was found liable only upon evidence that it assumed the duty to supervise the stevedore or oversee his work area, and the shipowner failed to intervene in the face of obvious danger. Hodges presented no evidence of shipowner involvement in, or control over, the stevedore's work area, and the record is devoid of any evidence that Evisea knew Hodges would stray into an area in which the stevedore had concluded its work and had so declared to the ship's crew.

Hodges' suggestion that *United States Fidelity & Guaranty v. Jadranska Slobodna Plovidba,* 683 F.2d 1022 (7th Cir. 1983), supports a conflict does not withstand close scrutiny. The issue addressed in the language from *Jadranska* cited by Hodges was not whether *Scindia* "appl[ied] to injuries occurring in non-work areas which remain under the active control of the shipowner." (Hodges Pet. at 15). Rather, the issue addressed by that portion of the *Jadranska* opinion cited by Hodges was whether *Scindia* applied to *areas* of the ship under the ship's control, as well as *equipment* operated by the ship's crew. Moreover, Hodges' contention that *Scindia* did not apply in *Jadranska* is erroneous, since the Seventh Circuit affirmed the necessity for instructing the jury in accordance with the duties outlined in *Scindia. Jadranska,* 683 F.2d at 1026-27. In fact, the jury instructions approved in *Jadranska* are essentially the same as those required by the Fourth Circuit in this case.

Hodges also misapprehends the holding of *Hartford Accident & Indemnity Co. v. Oceancarrier Shipholding of Belgium N.V.,*

799 F.2d 1093 (5th Cir. 1986). The *Hartford* decision affirms the holding of *Scindia,* interpreted through a previous opinion in the Fifth Circuit, that "once loading operations have begun, the vessel owner can be held liable for injuries to employees of the stevedore resulting from open and obvious dangers *only* in the event of actual knowledge of the danger *and actual knowledge* that he cannot rely on the stevedore to remedy the situation." *Id.* at 1097 (quoting *Helaire v. Mobil Oil Co.,* 709 F.2d 1031, 1038-39 (5th Cir. 1983) (emphasis in original)). Hodges presented no evidence that suggests that the *Hartford* decision applies to the facts of this case. Moreover, the *Hartford* decision in no way addresses the issue of what constitutes proper jury instructions under *Scindia.*

CONCLUSION

At trial, in the Fourth Circuit and now in his Petition for a Writ of Certiorari, Hodges seeks to limit the holding in *Scindia* to the narrow factual scenario that arose in that landmark case by disregarding the standard of care and the relative roles of a shipowner and stevedore meticulously outlined by this Court, and to substitute general standards of negligence. Such a position, if adopted, would emasculate *Scindia* and obliterate the blueprint that this Court has set forth to serve as a guide in developing a uniform body of law for cases arising under § 905(b) of the LHWCA. It would also be a retreat toward the unseaworthiness concepts that were abolished by the 1972 Amendments to the LHWCA. Neither this Court nor any circuit court has adopted the restrictive approach suggested by Hodges.

The Fourth Circuit properly applied *Scindia*; it requires no re-examination; there is no conflict among the decisions of the various circuit courts on this point; and the case presents no important question of federal law that has not been decided. Accordingly, Evisea respectfully requests this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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